PUBLIC CONTROL OF IRRIGATION.

I.

Most Western irrigation heretofore was the individual work of each farmer taking water in his own ditch out of a stream independently, sometimes two or three neighbors joining in a partnership ditch or as tenants in common. It is wide-spread, the accumulation of a generation. But facilities for this cheap installation by each farmer are pretty much in full use; new development is proceeding along the less accessible sources, requiring engineering on a large scale and heavy financial investment, compared to which the simple farmer's ditch which hitherto held the field, is primitive. As a result, new settlers are dependent upon distributing agencies for water supply; and where the successful cultivation of land depends upon irrigation, the water supply is the largest element of value of the land.

"The law in practice" leaves terms of service much to individual contract, which means to the will of the distributor. "The contracts under which such rights are secured and the regulations adopted by canal owners stand in the place of water laws to the farmers."[1] This has been due partly to the practical difficulties in promoting settlement in new frontier regions. Arid wastes, to be settled by irrigation, required the energy of the pioneer promoter; he was welcomed and encouraged; sentiment did not favor restricting development, and this is still much the popular attitude; the development corporation in a new region is not out of favor with the people there because of conservation. On the other side, the necessity for securing settlers made encouraging terms to settlers essential, and they have, as a rule, prospered and got along rather well with the distributor; economic causes brought that about, whatever the law might be.

But "the law in the books" is also responsible for this general freedom to distributors. The applicability of the law of public control of public service has come but slowly to be appreciated. Moreover, confusing currents peculiar to Western water law have turned "the law in the books" somewhat toward public ownership as distinguished from public control.

[1]Water Supply Paper on the Duty of Water, United States Department of Agriculture, 1909.

The tendency toward public ownership is strongest in Colorado, Wyoming, and the Interior States. California, in the books, after some uncertainty, seems now to stand upon the more conservative solution of public control under the law of public service, without public ownership. The vicissitudes of the California law will be considered first.

II.

The common law of public service is, since *Munn* v. *Illinois*,[2] familiar; being, in general terms, that property devoted to public service or use is affected with the public duty of performing prompt, equal, and reasonable service to all; that to secure this end, rates and terms of service must be reasonable, and service is compulsory upon tender of a reasonable rate; that no unreasonable conditions may be required of consumers; that there must be no discrimination; that the courts will enforce these things, and it needs no statute to give them the power.[3]

In the early days in California, however, water had been distributed by companies of capitalists to miners for their sluices, and to mill-owners for power, and to towns for domestic uses,[4] and they had been left to regulate terms of service by such contracts as they drew up. It was not until the late seventies and early eighties that rulings in the public interest in California were undertaken. At this time the pioneer irrigation communities of the West, those of Southern California, were founded. *Munn* v. *Illinois*[5] had been recently decided (in 1876) to the effect that one who devotes his property to public use owes the public corresponding duties even at common law, as above mentioned. To place this common law doctrine upon high ground, where it would be beyond the control of the legislature, which the California Constitutional Convention distrusted — "To lay a strong hand upon these monopolies" [6] — a provision was (two years after *Munn* v.

[2](1876) 94 U. S. 113.

[3]Some doubt was expressed in one California case, Stanislaus Water Co. *v.* Bachman (1908) 152 Cal. 716, whether statute is needed, but the weight of authority and the clear principle is that such is the common law, and needs no statute to establish it. See especially Munn *v.* Illinois *supra;* Wheeler *v.* Northern Colo. Irr. Co. (1887) 10 Colo. 582; Price *v.* Riverside etc. Co. (1880) 56 Cal. 431; and Leavitt *v.* Lassen Irr. Co. *infra.*

[4]Reporter's statement in Titcomb *v.* Kirk (1876) 51 Cal. 288; Fresno Canal etc. Co. *v.* Park (1900) 129 Cal. 437.

[5](1876) 94 U. S. 113.

[6]People *v.* Stephens (1882) 62 Cal. 209; Merrill *v.* Southside Irr. Co. (1896) 112 Cal. 426.

Illinois had declared such to be the common law) placed in the California constitution itself,[7] that "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law," which has been copied with occasional variation in the constitutions or statutes of numerous Western States.[8]

In spite of this strong intrenchment of the law of public service, the "laissez faire" principle has, as concerns irrigation, largely prevailed in California even to the present day, and left the matter to individual contract arrangement, in which, of course, the distributor, by virtue of its monopoly, has the consumer at the disadvantage which the law of public service is directly aimed against. Though the duty of compulsory service has been uniformly upheld in California, yet in what were known as the *Fresno Rate* cases the decisions upheld the validity of contracts fixing terms of service.[9] These cases upheld the validity of a contract making the water charges a lien upon the land supplied, and giving the company the right to foreclose upon the land upon default. Only in the *Park* case, the last of these, was the question of public interest discussed. There it was emphatically held immaterial. Speaking in the broadest terms, the language of the opinion declared that, in the absence of statute, there was no restriction upon the power of the public service company to regulate the terms of its service by contract (and things were said casting doubt even upon the efficacy of statutory restrictions).

At about the same time the United States Circuit Court for the Southern California District had been dealing with the question and, while its rulings were not wholly uniform, had inclined to the view of Circuit Judge Ross, that conditions or terms of service could not be made to rest upon contract, but wholly upon rules of law for public service (the common law if not laid down by statute). For example, it was ruled that the company could not require the consumer, in addition to the rate, to pay a premium or bonus, as a price for a perpetual "water right," since the law gave a perpetual right of service to everyone who tendered

[7]Art. XIV, sec. 1.

[8]Wiel, Water Rights in the Western States, 2nd ed., 626.

[9]Fresno Canal etc. Co. *v.* Rowell (1889) 80 Cal. 114; Same *v.* Dunbar (1889) 80 Cal. 530; Same *v.* Park (1900) 129 Cal. 437.

merely a reasonable rate.[10] But in *San Diego Flume Co.* v. *Souther*[11] the United States Circuit Court of Appeals accepted the *Park* case in its fullest terms of unlimited contract regulation. Unwillingly, Judge Ross thereupon held that the company could fix its rates by contract with each consumer; that the courts could not question them; and that they prevailed even if the public rate-fixing authorities subsequently established a lower rate.[12]

Thus, the power of the company to fix the terms of its service by stipulations in contracts (which, because of its monopoly, a consumer is rarely in a position to refuse to sign) became an accepted rule in California (at least in the absence of express action by the Board of Supervisors in regard to rates) even though the law of public service had been raised into the Constitution itself.

And yet, as already said, the California court has always upheld the common law rule of compulsory service, and further, in a case decided in the same year as the *Park* case, and just after it, the court in just as general and emphatic terms, denied the binding force of contracts fixing terms of service. In *Crow* v. *San Joaquin etc. Irr. Co.*[13] damages were granted for shutting off water from a consumer who (payment not having been demanded in advance) was in arrears in paying the contract rate for a past year, but tendered the rate for the coming season. Though the contract for the previous years, and the company's rules and regulations, provided that "no land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid," it was held without consideration, for it was the duty of the defendant company to furnish the plaintiff with water whether he agreed to the regulations or not, and "this rule precludes the idea that any other duties can be prescribed or imposed, except the tender of the rate [implying the tender of such rate as might be reasonable, in the absence of statutory rate-fixing], as a condition for supplying water, as required by law." It was held enough that plaintiff tendered the rate for the coming season; for the arrears the company must seek other redress than shutting off the water. This left little field for the binding force of contract

[10]These federal cases are reviewed in Souther *v.* San Diego Flume Co. (1901) 112 Fed. 228.

[11](1898) 90 Fed. 164; s. c. 104 Fed. 706.

[12]Souther *v.* San Diego Flume Co. *supra.*

[13](1900) 130 Cal. 309.

conditions; and yet for ten years the *Park* case has been regarded as the law.

Concurrently with this inconsistency in both State and federal decisions, there was (and is) likewise inconsistency in the statutes. They provide that the County Boards of Supervisors should fix rates,[14] and a charge of a higher rate should forfeit franchise and water works,[15] and that no contract shall fix a rate higher than that fixed by the Board of Supervisors,[16] and that service at the rate so fixed is compulsory;[17] that in the absence of such public rate-fixing, service is compulsory at the rate generally charged by the distributor in the vicinity[18] (with the implication, clearly the rule at common law, that tender of a reasonable rate is sufficient, if the rates actually charged be excessive). But at the same time, they enact that public regulation by the Board of Supervisors shall not affect contracts made prior to the time such regulation is made;[19] and the waiver by the distributor of payment in advance shall be sufficient consideration for a contract;[20] and generally, in a sweeping provision, that nothing whatever shall prohibit or invalidate at all any contract already made or hereafter made.[21] These acts present the same inconsistency as the decisions, and, like the decisions, predominate in favor of a paramount right of the distributor to regulate the terms of its service by contract. The statutes indicate the influence of the distributing companies in the legislature, which it had been the object of the constitution to guard against.

Now, within a few months of this writing, the Supreme Court of California has, in a case below referred to (constituting practically a return to the *Crow* case and the rulings of Judge Ross in the federal court) gone a long way toward clearing the confusion by upholding the general law of public service, with its public safeguards, as paramount to contract regulation — the law of reasonable service, upon tender of a reasonable rate, — declaring that statutes to the contrary are unconstitutional because of the constitutional provision declaring the use a public one, and pretty nearly, if not actually overruling the *Park* case and similar cases.[22]

[14]Stat. 1880, p. 16, 1885, p. 95.
[15]Stat. 1880, *supra.*
[16]Stat. 1901, p. 331, sec. 2.
[17]Stat. 1885, p. 95, secs. 8-10.
[18]Stat. 1885, p. 95, sec. 5, as am. 1901, p. 80.
[19]Stat. 1901, p. 331, sec. 4.
[20]Stat. 1901, p. 331, sec. 3, evidently passed to overrule the Crow case.
[21]Stat. 1885, p. 95, sec. 11-1/2 noted by Stat. 1897, p. 49.
[22]Leavitt *v.* Lassen Irr. Co. *infra.*

The foregoing regarding the California law shows the difficulty encountered in establishing any rule in the public interest. There was and is also confusion in California in the distinction between public control and public ownership; but before entering upon the California decisions in that regard, it seems advisable to consider the trend of the law of Colorado, Wyoming and the Interior States generally, which "in the books" lean strongly toward public ownership, as distinguished from mere public control under the law of public service.

III.

The constitution of Colorado declares, in words now copied by constitution or statute in most Western States (but not in California), "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public;"[23] in Wyoming and some others, "the property of the State."[24] Fundamental questions are involved in the effect of this. Of most moment at the present writing is the conflict which has arisen between federal and State advocates for control of water industries upon public lands.[25] Less important now, but formerly of importance, was the question of the rights of the owners of riparian lands.[26] But the matter now in hand is the effect it has had toward actual public ownership of irrigation distributing works built by private capital.

The declaration of public or State ownership of waters has not been critically examined with the distinction between sovereignty and proprietorship in view in this connection. In other connections occasional decisions tended to construe the declaration as one of State sovereignty or regulative power as distinguished from actual ownership;[27] but in the matter now in view, the dis-

[23]Art. XVI., sec. 5.

[24]Wiel, Water Rights, 2nd ed., sec. 36.

[25]Just as this is being written, an Associated Press dispatch in the daily newspapers illustrates this. It reports the Colorado Conservation Commission as resolving "That as the waters of this State are the property of the State, the power developed by such water should remain forever under control of the State, and that all legislation tending to abridge or restrict such control be discouraged."

[26]Regarding both these matters see the present writer's book on Water Rights in the Western States, 2nd ed. and the author's article in 43 Amer. L. Rev. 481.

[27]Water Rights, 2nd ed., sec. 36. As to the distinction between State sovereignty and State ownership see especially Moore *v.* Smaw (1861) 17 Cal. 199 at 218.

tinction has not, in any decision the writer can recall, been in mind; the declaration has been tacitly taken for what it says, — State or public proprietorship or ownership of waters the same as in a public building. The result has been in Colorado and the Interior States to build a system of law of water distribution upon the basis that consumers from a distributing system are the real proprietors of the system, and the distributor or canal company but their agent to care for the works and bring the water to the consumers' land. The law of public service, resting upon the sovereign power to regulate, though mingled with the law of ownership, is thus subordinated; the consumers' rights are primarily worked out upon the basis that they are the real owners of the distributing system.

The first case in Colorado was *Wheeler* v. *Northern Irr. Co.*[28] The question was one of compulsory service without exaction of a premium or bonus for furnishing it, and Helm, *J.*, worked it out chiefly upon the general law of public service companies, relying upon *Munn* v. *Illinois*. But he also refers to the Colorado constitutional provision above quoted and declares that the distributor is not the owner of the right to the water, but is simply "an intermediate agency" and "engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use." This has since been developed to the rule, now general in the arid regions, that one receiving water for irrigation from a corporation has, to the extent of the water he receives, an actual "water right" or freehold interest in real estate; that the consumers own the water rights, and the company, properly speaking, owns none. The most succinct expression of this is in *Wyatt* v. *Larimer etc. Co.*,[29] where it is said:

"We adhere to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that 'it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners.' * * * The consumer under a ditch possesses a * * * property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his use."

In other cases it is said:

[28] (1887) 10 Colo. 582.
[29] (1893) 18 Colo. 298.

"By taking from its canal the consumer recognizes and ratifies its acts of construction and diversion, making them his own. And the situation, so far as this question is concerned, is not different from what it would have been had the consumer in fact employed the carrier to construct the canal for himself alone." [30]

Again, "The right to the use of water should never be separated from the land to which it is applied" and the canal company is but a means of conveyance having no ownership in the water rights, saying "the irrigation company does not own the water; it is only the servant of the public to carry it to the land for which it has been appropriated." [31] In the end, when the number of consumers is up to the full capacity, the company is then "without any further interest in the canal or water-right." [32] In Wyoming (and the recent Oregon statute following Wyoming) this is evidenced by the State Engineer giving to each consumer a "certificate of appropriation," which is the term used to designate that he has, in the flow and use of the natural stream from which the company's supply comes, the highest right recognized by law, equal to and probably displacing any right therein held by the company in initiating its plant. This idea that the consumers under a canal are, through the intermediate agency of the canal, the joint owners of the natural water resources involved, and that the distributor is not, predominates in the Interior States.

In some of the results of the public ownership view the law of public service is materially departed from in serious ways the policy of which may be a matter of question. The consumer, having not merely a right of service but one of actual ownership, is governed by the law which has been developed for the use of natural streams. One feature of this has hitherto been independence of land and water; and so the consumer has been held to have the right to transfer his use from one place or purpose to another.[33] Another feature is that the general Colorado law of streams is based upon priority of right to the first who begins the use, and there is a strong tendency to apply this to consumers *inter se* in times of scarcity — the later consumer must stand the loss first while the prior one enjoys his full supply.[34]

[30]Helm, C. J., concurring in Farmers' etc. Co. *v.* Southworth (1889) 13 Colo. 111.

[31]Farmers Canal Co. *v.* Frank (1904) 72 Neb. 136.

[32]Nampa Irr. Dist. *v.* Gess (1910) 17 Idaho 552.

[33]Hard *v.* Boise etc. Co. (1904) 9 Idaho 589; Knowles *v.* Clear Creek etc. Co. (1893) 18 Colo. 209.

[34]Water Rights, 2nd ed., sec. 426.

A still more important result, however, is that above adverted to: when the number of consumers reaches the full capacity of the distributing system, the company drops out as owner and the system belongs wholly to the consumers by a common ownership, to be thereafter conducted upon a co-operative basis. There has, indeed, been a plan of organization, seemingly of extensive use in Colorado, expressly providing in the consumers' contracts that when the number of consumers reaches the estimated capacity of the canal, the consumers as a body are entitled to an express conveyance of the canal and water system.[35]

A specially noteworthy stride toward solving the problems of distribution to irrigators by a resort to public ownership is the rapid spread of the "Irrigation District" system, whereby the owners of land within a given district susceptible of irrigation from a common source of supply may, upon petition of a certain proportion thereof, form a *quasi* municipal corporation taking in all land within the district, unanimous consent not being required; all land may be included though some owners object. Assessments are levied, bonds issued, and works built and managed by the publicly elected officers of the district. This system is rapidly spreading, there being statutes therefor now in thirteen States, and constitutes an express recognition of the doctrine of public ownership of irrigation works.[36]

Public ownership has also received great impetus by two acts of Congress, viz., the Carey Act[37] and the Reclamation Act.[38] The federal conservation movement to-day is opposite, viz.: — that title should never leave the federal government; but the above acts were passed some time ago, based upon the idea that title shall finally rest in fee simple in the consumers themselves, as actual owners. Under the Carey Act (in force in about seven States, but chiefly in use in Idaho, Wyoming, Oregon and Utah)

[35]La Junta etc. Co. *v.* Hess (1895) 6 Colo. App. 497; Wyatt *v.* Larimer etc. Co. (1893) 18 Colo. 298; Blakely *v.* Fort Lyon Co. (1903) 31 Colo. 224; Water Supply etc. Co. *v.* Larimer etc. Co. (1897) 24 Colo. 322; Broadmoor etc. Co. *v.* Brookside etc. Co. (1898) 24 Colo. 541. See Idaho Fruit Land Co. *v.* Gt. Western Land etc. Co. (Idaho 1910) 147 Pac. 989.

[36]See Water Rights, 2nd ed., sec. 429 *et seq.* The system arose in California about thirty years ago, but was not successful there. Only four districts are in operation in California to-day out of fifty shown in the last census. It is reported as meeting success to-day in other States. This experiment in public ownership in California is interesting in connection with what seems also to be a general tendency against public ownership in California decisions below considered.

[37]28 Stat. 372, am. 29 Stat. 343 and 31 Stat. 1138-1158.

[38]32 Stat. 388.

the United States has granted large areas of land to the State, and the State regulates the terms upon which companies shall develop them. The generally specified terms are that the consumers become owners of the land and also of the water rights as appurtenances to the land, and shall completely take over the system, own, control and conduct it when the lands thereunder are fully settled. The same is provided by the Reclamation Act, whereby, after 10 years (as provided by the original act, though there is some plan to extend it to 20 years) title to each reservoir, distributing system and water right shall pass to a co-operative organization of consumers, and the United States shall drop out of the field.[39]

The rights of consumers in most Western States (other than California) being thus, under every form of organization, those of ownership, public regulation and control are based less upon the law of public control of public service, than upon a new system of State administration, based upon actual State or public ownership in waters. A State Engineer and an administrative board are provided, and the entire State is divided into water divisions and these subdivided into water districts for administrative purposes. The water officials take control of the works of companies, consumers, and independent individual water owners alike, measure out the water, shut or open headgates, and generally police the waters of the State. In one State, at least, the State Engineer seems to be given power to fix rates[40] (though usually rate-fixing is left, as in California, to the County Boards of Supervisors). This administrative system is independent of any law of public service; it is based upon public or State ownership of all waters, whether in public service or not, whereby the State Engineer has complete control over all waters in the State.[41]

IV.

Returning now to the California law, the question chiefly involved, as already considered, was not of the relative status of consumer and distributor, but of the right of the distributor to

[39]The writer is informed by Mr. Graves, the Chief of the Forest Service, which under Mr. Pinchot, has led in advocating the retention by the United States of title to natural resources, that the Service does not oppose this transfer of title to the consumer-community as concerns irrigation, holding that irrigation and power occupy different positions.

[40]South Dakota Stat. 1907, c. 180, sec. 36.

[41]Water Rights, 2nd ed., Part IV.

regulate the terms of its service by contract (which, virtually, is to leave the distributor uncontrolled). Though strongly upholding the public service rule of compulsory service and against forfeitures, yet the weight of California authority in other respects has been that the same law governed as in contracts between private parties, as to conditions of service, creation of liens, and rates and charges. This tendency to apply the general law of private contract affected also the question of the relative status of consumer and company, and through that a proprietary right in the consumer, as part-owner of the distributing system, showed itself in the California law somewhat similarly to the Colorado law.

This tendency to regard the consumer as an "appropriator," or part-owner of the water rights of the distributing system — as having a title in the real estate of the distributing system, and not merely a right of service — was, for the most part, tacitly assumed in the decisions. His right was declared "appurtenant to the land" and considered as though an interest in real estate;[42] and citing a Colorado case, the consumer was held to have actual ownership of a water right as real property for which he could bring an action to quiet title against the distributor,[43] saying that by contract with the distributor "an undivided interest, equal to the grantee's proportionate share of the water, was conveyed." So also it was provided by statute that whenever a corporation furnishes water to irrigate land, "the right to the *flow and use* of said water is and shall remain *a perpetual easement* to the land."[44] Again, in *Stanislaus W. Co.* v. *Bachman*,[45] the same doctrine was elaborately laid down. The result was a strong trend toward the Colorado basis of public ownership, recognizing in consumers proprietary rights as part-owners of the distributing system, with the logical end that when the number of consumers reached full capacity, they would, as a body, be the whole owners thereof.

Now, however, within a few months, the cases of *Leavitt* v. *Lassen Irr. Co.*,[46] and *Lassen Irr. Co.* v. *Long*,[47] have gone a long way to set aside the previous law both as to the binding force of contract regulation by the company of its service, and as to actual

[42] *E. g.* Fresno Canal Co. *v.* Dunbar (1889) 80 Cal. 535.

[43] Fudickar *v.* East Riverside Irr. Dist. (1895) 109 Cal. 29.

[44] Civil Code, sec. 552; italics inserted. See also Stat. 1897, p. 49, inserting sec. 11-1/2 into Stat. 1885, p. 95.

[45] (1908) 152 Cal. 716.

[46] (Cal. 1909) 106 Pac. 404.

[47] (Cal. 1909) 106 Pac. 409.

ownership of interest in the distributing system by consumers; instead, recognizing in strong terms the applicability of the law of public service or control, opposed to freedom of the company by contract to establish its terms to consumers, and opposed likewise to proprietary ownership in consumers as distinguished from the public right of control. The *Crow* case is preferred to the *Park* case, the *Stanislaus* case practically overruled, and the statutes, so far as they might bear to the contrary, declared unconstitutional.

The question in the *Lassen* cases arose out of what the consumer contended to be a "free water right," under which he claimed the right, by contract, to receive water from the company's canal without charge. Such a transaction, the *Lassen* cases held, would be illegal, because the distributor was a public service company. The plaintiff had relied partly upon the validity of contract, but the rule of public service is held to invalidate a contract for free service to one consumer, as it would give him a preference right over other consumers — that is, would be discriminatory. He had also relied upon the *Stanislaus* case, arguing that the contract gave him a paid-up freehold interest in realty. This claim also was held untenable, in that, it was held, it would create a private estate in property irrevocably dedicated to public use; or, as it was said, "turn a public use into private property." The *Stanislaus* case was limited to its facts, and further said to have overlooked the law of public service, and consequently no authority in public service cases.[48] The *Park* case, while not overruled, is subordinated to the *Crow* case, which practically denied the binding force of contract conditions of service. As to the statutes it was said:—

"It is, of course, a truism of the law that an act of the legislature conflicting with constitutional provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the Constitution and, to be valid, must be in harmony therewith. We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the state for public rental, distribution, and sale, cannot give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the

[48]Aside from questions of public service, see the present writer's article in 22 Harv. L. Rev. 190, regarding the view taken in the Stanislaus case as to the philosophy of the law of running waters.

company, they are entitled to a continuation of such supply, unless their quantum shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has, fairly apportioned between its consumers.[49] If it be conceived that section 552, Civ. Code, is designed to confer upon any particular consumer any special, permanent, and preferential right above what is here stated, that effort, being plainly violative of the Constitution, would be held void. The same declaration applies to the provision of"

another statute referred to.[50]

The result is not wholly to clear up the California law. But if the principles of the *Lassen* cases are adhered to, it will end in relegating contract regulation of terms of service purely to non-essentials, leaving all essential terms of service to be fixed by the legislature, or, in the absence of legislative action, to the common law powers of the courts to enforce, by injunction, mandamus, or other process, a prompt, equal and reasonable service to all, and to disregard any contract that may stand in the way. Contract regulation will remain binding only where its terms are reasonable to the consumer, are in the public interest, are not discriminatory, nor in violation of the duty of the company to serve, without unreasonable demands, all who apply and tender a reasonable rate.

Likewise it will end the tendency to public ownership toward which the recognition of proprietary estates in consumers had been leaning.[51] It places (if adhered to) the California law upon the pure doctrine of public service, resting in public control, sovereignty or regulative power to command for the public good (as opposed to public ownership, resting upon a right of the consuming public as proprietors of the works).

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[49]*Quaere* whether the law of public service necessitates taking consumers beyond capacity.

[50]The act entitled: "An act to regulate and control the sale, rental, and distribution of appropriated waters in this state other than in any city, county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March 12, 1889, and of the amendment to that act by the act approved March 2, 1897. (Stat. 1897, p. 49.)

[51]The Lassen cases considered the creation of a proprietory estate in the consumer illegal as withdrawing the property from public service and turning it into private ownership. It would create ownership in the consumer, it is true. But, as we have endeavored to show, if safeguarded against discrimination, the result is rather public ownership than private ownership. The decision in that respect, therefore, would appear to have involved more a question of policy than of law.

V.

There are thus three doctrines obtaining in the West with regard to the relative status, rights and duties of distributors and consumers of water for irrigation: viz., contract regulation, public regulation, public ownership. With regard to their relative merits, experience has shown the benefit of a free hand in building up new systems and pioneering; but after the experimental stage in a given region is over, the evils of untrammeled contract regulation need no exposition. The present day popular excitement has familiarized them to the public mind. With regard to the relative merits of simply public control, or actual public ownership, the country is now at issue generally. It may be significant that the tendency in Western irrigation development is toward public ownership. If the California law is to adhere to the more conservative ground of public regulation without consumers' ownership, some strong State executive system to enforce the law of public control — the law of public service — seems essential. There is no administrative system headed by a State Engineer in California, such as now exists in most other Western States based upon public ownership of waters, and all attempts to create that system in California have hitherto been unsuccessful. Perhaps the New York experiment of a public service commission will furnish the solution.

SAMUEL C. WIEL.

SAN FRANCISCO, CAL.